Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RACHAMIN ANATIAN, et al.,
Petitioners,

v.

COUTTS BANK (SWITZERLAND)
LTD., formerly known as COUTTS & CO. AG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RACHAMIN ANATIAN
Petitioner Pro Se

12 LINCOLN STREET
APARTMENT #3
TEL AVIV, ISRAEL 67134
011-972-3-936-3232

Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

4/5RP

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's supervisory power to review the affirmance of the dismissal of Plaintiffs' claims on grounds that bear no relation to Plaintiff's pleadings, to wit:

(i) Dismissing Plaintiffs' RICO claim on the grounds that the pleadings do not comply with the requirements of 18 U.S.C. § 1962(c) when, in fact, Plaintiffs *pursued a claim solely under 18 U.S.C. § 1962(a)*;

(ii) Affirming the District Court's denial of leave to amend the Complaint on the grounds that Plaintiffs had failed to request leave to amend in the District Court when, in fact, *leave had been requested and denied*;

(iii) Dismissing Plaintiffs' claims under the Securities Exchange Act of 1934 on the grounds that Defendant's overvaluation of shares of Plaintiffs' stock on monthly statements that Defendant sent to Plaintiffs was not "in connection with" the purchase or sale of securities, when, in fact, *Plaintiffs never asserted that such overvaluation had anything to do with their securities claims*; and

(iv) Dismissing Plaintiffs' RICO and securities claims for failure to plead fraud with particularity while ignoring the detailed allegations of the Complaint and, instead, focusing on a single allegation *that did not form a basis of Plaintiffs' fraud claims*?

PARTIES TO THE PROCEEDING

Petitioners

Rachamim Anatian, Atik LLC, Charles Gundy LLC, Chesed LLC, Kaballa LLC, Keter LLC, Mamash LLC, and Van Harper LLC.

The LLCs have no parent companies or non-wholly-owned subsidiaries.

Respondents

Coutts Bank (Switzerland) Ltd., formerly known as Coutts & Co. AG.

Coutts' parent is National Westminster Bank. Coutts has no non-wholly-owned subsidiaries.

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CITATION OF REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Second Circuit is reported at 193 F.3d 85 (2d Cir. 1999). A copy of the opinion is included as Appendix A at 1a – 8a.

The opinion of the United States District Court for the Southern District of New York is not included in an official reporter. It may be found at 1998 WL 526440 (8/21/98) or at RICO Bus. Disp.Guide 9589, and is included as Appendix B at 9a – 18a.. A copy of the Order entering judgment in the District Court is included in Appendix B at 19a-20a.

BASIS OF JURISDICTION

1. *Jurisdiction of this Court*

The Second Circuit decided this matter on September 17, 1999; leave for rehearing was not requested in the instant matter.[1] The Second Circuit subsequently entered judgment on November 16, 1999. As this petition is filed within ninety days of the decision of the Second Circuit, it is timely. Supreme Court Rule 13.1.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] The Second Circuit issued a single opinion disposing of the appeals in this matter and in a related matter brought by Mordechai and Margaret Gal-Oliver. The Gal-Olivers served and filed their petition for rehearing on October 1, 1999; said petition was denied without opinion on November 18, 1999.

2. *Jurisdiction of the Court of Appeals*

The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 1291, in that this was an appeal from a final decision of the United States District Court for the Southern District of New York (Rakoff, J.), entered August 25, 1998, dismissing certain of Plaintiffs' claims (specifically, their claims under the Securities Exchange Act of 1934 and the Racketeer Influenced Corrupt Organizations Act, and their claim for declaratory judgment) with prejudice, and the remainder of their claims without prejudice, upon a motion to dismiss or abstain. A Notice of Appeal was filed on September 18, 1998

3. *Jurisdiction of the District Court*

The subject matter jurisdiction of the District Court over the claims in this action was invoked pursuant to 28 U.S.C. § 1331, in that this action arises under the laws of the United States, specifically the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*, and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* Subject matter jurisdiction over the claims that arise under state law was invoked pursuant to the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367(a).

The subject matter jurisdiction of the District Court was also invoked pursuant to 28 U.S.C. § 1332, in that the amount in controversy in this matter exceeds $75,000, exclusive of interest and costs at the time of filing, all of the plaintiffs were citizens of the State of New York or Delaware, and the defendant is a foreign corporation.

STATUTORY PROVISIONS

Racketeer Influenced and
Corrupt Organizations Act,
18 U.S.C. § 1962(a)

"It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

* * * *

Securities Exchange Act of 1934
Rule 10b-5, 17 C.F.R. § 240.10b-5

"It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

STATEMENT OF THE CASE

This action arises out of the massive fraud committed by Coutts Bank (Switzerland) Ltd. ("Coutts") in making a commitment to loan at least $100 million (the "Commitment"), to seven limited liability companies (the "LLCs") controlled by Rachamim Anatian ("Anatian") primarily for use in connection with a television home shopping business that Anatian co-founded. After releasing millions of dollars to Anatian – a sum which was promptly invested in the fledgling network – Coutts began refusing to release further funds and ultimately, without a legitimate explanation,[2] announced its decision to terminate the loan, financially devastating both the new business venture and Anatian. As later became clear, this Commitment was made with Coutts' full knowledge that it lacked the authority to make a loan of such magnitude or to release the full amount of funds promised under the Commitment; it was further made with Coutts' full knowledge that, even if the bank as a whole had the

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[2] Coutts has stated that it declined to advance further funds because the loans were undersecured. Anatian alleged that Coutts agreed to treat the value of the GSN stock itself (valued by Coutts at $75 million) as collateral for the loan. (A97) Even if that were not the case, in December 1996, the time that Coutts began to refuse to make advances, the USAD stock held by Coutts as collateral had a value, in excess of $52 million; that was nearly $2.5 million more than the amount of then-outstanding loans to the LLCs, less the amount held by Coutts in certificates of deposit. (A574) Coutts' purported reason, therefore, has no basis in fact.

authority to make the loan, its New York office did not have the authority to do so without the consent of Coutts' London office -- consent which was not sought prior to making the Commitment. These facts were concealed from Anatian, who entrusted his entire future as well as virtually all of his then-considerable assets to this Commitment. Through the LLCs, he pledged virtually all of his assets – consisting mainly of his stock in USA Detergents, Inc. (a publicly traded company co-founded by Anatian and traded on NASDAQ) once worth in excess of $52 million -- in return for the Commitment. Anatian was financially devastated when Coutts reneged upon the Commitment and refused to return the collateral. The new television network was forced to declare bankruptcy. Anatian and the LLCs lost virtually all of their assets; they were unable to pay their debts (including their obligation to repay that portion of the Commitment – less than 50% -- which Coutts had honored). This action followed.

Rachamim Anatian was one of the founders of USA Detergents, Inc. ("USAD"), a manufacturer of "value-branded" household detergents. In 1995, before the initial offering of USAD shares to the public, Anatian became a customer of Coutts. (A85)[3] Coutts pursued a highly aggressive strategy in making loans to Anatian. While referring to certain "internal loan limits," Coutts officers assured Anatian that virtually unlimited funds could be provided for his benefit simply by nominally making these loans to other people. (A87) In this way, Anatian received millions of dollars of loan funds in excess of Coutts' "internal" limits through loans nominally

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[3] Reference is made to the Joint Appendix filed by the parties with the Second Circuit, and designated as A___. One copy of the Joint Appendix is being filed with this Petition for the convenience of the Court.

made to his wife and to an impecunious student who boarded with the Anatian family. Coutts' officers assured him that this practice was often used at the bank, and Anatian saw no reason not to believe them. *Id.*

In 1995, Anatian and a colleague, Barbara Laurence, founded Global Shopping Network, Inc. ("GSN"),[4] an electronic retailer that was to sell merchandise to customers via television. (A85-86) GSN began televising its home shopping programming in March 1996 through cable and satellite distribution. The programming ultimately was carried in approximately 7 million to 8 million homes. *Id.*

While many television home shopping networks have been extremely successful, it is widely acknowledged in the industry that a carriage of at least 20 million cable homes is essential for success. (A89) Anatian planned to achieve this carriage by purchasing television stations in key markets. He intended to fund these purchases through an initial public offering ("IPO") of at least $500 million. (A86, A89) Because GSN was a fledgling company which could not demonstrate a favorable earnings record to securities underwriters, initial private financing of at least $100 million was necessary in order to enable the anticipated IPO to proceed. (A89-90)

Upon learning of Anatian's plans for GSN, Coutts expressed eagerness to provide the requisite initial financing. Time and time again, its officers assured not only Anatian, but other business leaders who were depending upon GSN's receipt of adequate financing, that Coutts had made an absolute and

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[4] For simplicity, GSN and both of its related entities, Global Broadcasting Systems and Ramcast, Inc., are referred to herein as "GSN."

unconditional commitment to make a loan of $100 million for Anatian's use in connection with GSN. (A91-95; A514-32) Coutts eventually suggested that Anatian form seven limited liability companies (the LLCs) to receive the loan proceeds. (A94) This device, *i.e.*, dividing a single loan into several for the purported benefit of several borrowers, was similar to that used in connection with the earlier loans, but with the added benefit of eliminating personal liability.[5] Anatian, again, had no reason to doubt that this was a legitimate way to comply with Coutts' purported internal regulations, and agreed to the plan. (A94-95) At Coutts' officers' requests, he created the LLCs and, in June of 1996, received the first installment of the loan proceeds. (A95-96)

Coutts handled the loan proceeds in a peculiar and restrictive manner. Although Anatian, on behalf of the LLCs executed a series of promissory notes in the aggregate of $57 million, Coutts required that $15 million – more than 25% of the loan proceeds – be retained in certificates of deposit at Coutts, to which Anatian was permitted no access. (A96-97, A246-47) Another $33 million was applied to retire the loans that Coutts previously made to Anatian, his wife and the rabbinical student (all for Anatian's benefit). *Id.* Thus, with the first installment of the loan proceeds, only $9 million in additional funding was actually released to the LLCs. *Id.*

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[5] At some time, Anatian did execute a series of personal guarantees. He contends that certain of these guarantees were executed under duress (when Coutts refused to release funds under its commitment unless Anatian executed such guarantees), and that the remainder were executed as a result of mutual mistake or fraud. Coutts disagrees. Nevertheless, it is undisputed that at the outset, Anatian was not required to execute personal guarantees. (A96, A446-451)

In the following months, Coutts continued to assure Anatian and others that the $100 million commitment was absolute and unconditional while, at the same time, placing increasingly bizarre restrictions on loan funds. (A101; A103) In fact, while Coutts eventually "loaned" the LLCs approximately $72 million, it required that more than 40% of those funds – more than *$30 million* – be retained in certificates of deposits at Coutts or used to purchase additional shares in USAD, which Coutts then held as collateral. Only $2.5 million more in actual usable funds was ever released to the LLCs. (A107-08)

Nonetheless, Coutts subsequently assured Anatian that the funds it held in the form of CDs and additional collateral, as well as additional loan funds, would be released when Anatian was able to meet certain conditions, such as retaining an underwriter and arranging bridge financing for the IPO. (A98-107) In each instance, when Anatian met the stated requirement, Coutts came up with yet another requirement for the release of funds. *Id.*

Nevertheless, in reliance upon Coutts' $100 million Commitment, Anatian began acquiring assets and planning the IPO (A105) GSN acquired, or obtained the right to acquire, ten television stations. (A105) It filed a Form S-1 Registration Statement with the Securities and Exchange Commission. (A105-106) It retained an underwriter for the IPO, and obtained bridge financing. (A103-104)

By early 1997, New York-based Coutts officers informed Anatian, for the first time, that the entire balance of the Commitment required the approval of Coutts' London office and that, moreover, in order to obtain such approval, not only could the bank not release additional funds, it had to actual *reduce* the outstanding loan to less than $50 million by selling

collateral and retiring the certificates of deposit. (A104) These officers still maintained, however, that the Commitment was absolute and unconditional, and that the funds would be forthcoming. Id.

By June 1997, Coutts' continued refusal to release further funds resulted in the scuttling of the IPO and the financial devastation of both GSN and Anatian himself. (A111) As Anatian later learned, the Commitment was never anything more than an elaborate fraud. Coutts could never legally have made the loans, because they exceeded not only Coutts' internal loan limits, but also its statutory loan limits. N.Y. Banking Law § 202-f (applying Banking Law 103 to foreign banks). (A117) Moreover, even if Coutts' New York office had the legal authority to make the loans, the Coutts officers making the commitment did not have the authority to make a commitment of this magnitude without the permission of their London superiors -- permission which the Coutts New York officers did not even request until well after they had made the Commitment, and after Anatian had pledged millions of dollars in collateral. (A104-105, A119) Indeed, the required permission from London was never received. (A89)

Within months of its repudiation of the Commitment, Coutts fired all of the officers involved in this transaction and announced the closing of its New York office (A111) - only to have its parent company, National Westminster Bank, apply to reopen the location as a NatWest branch. Published reports indicate that both the Federal Reserve Bank and the New York District Attorney's Office are currently investigating allegations of fraud and impropriety against Coutts.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND GRANT CERTIORARI IN LIGHT OF THE SECOND CIRCUIT'S WHOLESALE DISREGARD OF THE PLEADINGS AND PROCEDURAL POSTURE OF THIS ACTION

In this matter, the Second Circuit issued what, on its face, appears to be a proper statement of law. It is only when one looks beyond the surface of that opinion that it becomes apparent that the Second Circuit departed from the accepted course of judicial proceedings in a manner that can only be described as shocking and wholly improper, and which undermines the very foundation of our system of jurisprudence. Such actions cannot be tolerated.

The most egregious example of the Second Circuit's mishandling of the appeal below is its cavalier dismissal of Plaintiffs' RICO claim on the grounds that "plaintiffs failed to allege an 'enterprise' sufficiently distinct from the RICO 'person' with respect to the claims based on [18 U.S.C.] section 1962(c)." Appendix A at 7a. Plaintiffs, however, *never even pursued a claim under 18 U.S.C. § 1962(c).*[6] To

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[6] Plaintiffs had asserted an additional claim under 18 U.S.C. § 1962(c) in the District Court. In that claim, Plaintiffs alleged the existence of a RICO enterprise made up of the four Coutts officers – Imison, Cawdron, Simmons and Economou. Plaintiffs further alleged that Coutts was responsible for the actions of the enterprise by virtue of *respondeat superior*. (A129-34) Plaintiffs chose not to pursue that claim upon appeal. Such claim was thus not before the Second Circuit.

the contrary, Plaintiffs asserted a claim under 18 U.S.C. § 1962(a). (A125-29) It is well established that the "enterprise" and "person" may be identical for the purpose of a claim under section 1962(a). *See, e.g.*, Official Publications v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989); D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir.), *cert. denied* 486 U.S. 1061 (1988); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), *aff'd* 473 U.S. 606 (1985).

Such misplaced reliance, regrettably, was not the sole instance in which the Second Circuit based its decision upon matters having no relation whatsoever to the case at hand. In fact, *each and every ground upon which the Second Circuit based its decision has no basis whatsoever in the pleadings.*

First, while "recogniz[ing]" that "leave to amend should be freely granted, especially in the case of a Rule 9(b) dismissal," the Second Circuit found that "plaintiffs made no attempt to seek leave to amend their amended complaint," and that, accordingly, it was not "an abuse of the district court's discretion to order [the] case closed ...." Appendix A at 8a. In fact, however, leave to amend *was* requested and specifically denied by the District Court. (A760, A780) Thus, by the Second Circuit's own reasoning, the District Court abused its discretion in refusing to grant Plaintiffs leave to amend their complaint. *See also, e.g.*, Foman v. Davis, 371 U.S. 178, 182 (1962) ("Rule 15(a) [of the Federal Rules of Civil Procedure] declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant,

repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given'"); Oliver Schools, Inc. v. Foley, 930 F.2d 248, 253 (2d Cir. 1991) ("Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course"); Ronzani v. Sanofi, S.A., 899 F.2d 195, 198 (2d Cir. 1990) ("Since [plaintiff] had not previously been given leave to amend, and had offered to amend his complaint, we hold that the court abused its discretion in dismissing the complaint without leave to amend").[7]

Second, the Second Circuit ignored Plaintiffs' factual allegations that established their right to relief even absent amendment. The Second Circuit thus affirmed the dismissal of Plaintiffs' claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78, on the grounds that, "the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment do not pertain to the purchase or sale of a security.... Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark." Appendix A at 6a. This is *not* the basis of Plaintiffs' securities claim, however. Plaintiffs' actual contention – which the Second Circuit utterly ignored – was that Plaintiffs were

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[7] Plaintiffs amended their complaint once as of right to add claims under RICO. While certain typographical errors were corrected, no other substantive changes were made to the other relevant claims.

induced to pledge their securities[8] – at one time worth as much as $52 million – by Coutts' representations that, in return, Coutts would make a $100 million loan to the LLCs; at the time Coutts made this representation, however, it either knew or should have known that it lacked both the legal and internal authority to make such a loan. (A115-20; A574) The Plaintiffs were thus induced to "sell" their $52 million worth of securities not for the $100 million they believed that they were getting, but for less than half of that sum, that is, for a consideration known by Coutts not to be what it purported to be. This is the very essence of a claim under section 10b of the Securities Exchange Act of 1934. *See* Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984), *cert. denied*, 469 U.S. 884 (1984) ("[T]he purpose of § 10(b) and Rule 10b-5 is to protect persons who are deceived in securities transactions -- to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known by the buyer to be inadequate *or for a consideration known by the buyer not to be what it purports to be*" (emphasis added)); Weaver v. Marine Bank, 637 F.2d 157 (3d Cir. 1981), *rev'd (on other grounds)* 455 U.S. 551 (1982) (bank induced plaintiffs to pledge securities in support of a loan, knowing all the while that the loan was problematic; the plaintiff-"sellers" thus did not receive full value in return for the pledge of their securities and, accordingly, the transaction was "in connection with" the sale of securities). It was only by totally ignoring the well-pleaded

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[8] It is well established that a "sale" includes a pledge of securities as well. Rubin v. United States, 449 U.S. 424 (1981) (pledge is "sale" under the Securities Exchange Act of 1933); Chemical Bank, supra, 726 F.2d at 939 (applying Rubin reasoning to Securities Exchange Act of 1934 and finding that a pledge of securities is sale under the 1934 Act).

allegations of the complaint that the Second Circuit was able to find to the contrary.

Third, the Second Circuit dismissed Plaintiffs' fraud-based claims for failure to plead with specificity, on the grounds that "[a]lleging that Coutts made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud." Appendix A at 7a. While this point is undeniably true, it bears no relation whatsoever to Plaintiffs' fraud allegations. In fact, the basis of Coutts' fraud was its promise to make a $100 million loan even though it knew or should have known that it could not do so. In particular, Plaintiffs alleged:

- "Anatian ultimately concluded, during the spring of 1996, that the sole means of assuring GSN's securing the critical mass or minimum carriage of 20 million cable homes was to purchase the requisite television stations. Given this conclusion that GSN would need to acquire television stations, the underwriters and industry experts then advised Anatian that the minimum capitalization for the GSN business would be at least $500 million." (A89)

- "Since GSN would not have the benefit of a favorable earnings track record over a period of several years, the underwriters also advised Anatian that any structure of the proposed IPO would require that at least 20% of such capitalization ($100 million) be in place at the time of the IPO, and that such capital would have to be derived from private equity. * * * Anatian informed Coutts of both the carriage and the private equity requirements." (A89-90)

- "The Coutts [R]epresentatives [defined to mean Paul Imison, Peter Cawdron, Derek Simmons and Mario Economou (A39-40)] continued to advise Anatian during this period of time that Coutts would support Anatian in this IPO objective and would assist him to facilitate the IPO. Ultimately, sometime between February and May 1996, Coutts represented and committed to Anatian, that it would provide Anatian with a loan of at least $100 million and up to $150 million, principally for the purpose of purchasing television station assets and providing working capital for GSN (the "Commitment"). This representation was thereafter frequently repeated to Anatian and to others, including but not limited to Frederick A. Horowitz (the director of Satellite Services for GE American Communications, Inc., which owns and operates the satellites used by GSN and many major television networks for broadcasting their programming), Robert R. Pik (a Vice-President of PaineWebber), Barbara Laurence (the President of GSN), and Mordechai Gal-Oliver (the head of production and operations for Global Broadcasting Systems, Inc.). The television station assets would then serve as the non-public financing element for the prospective IPO for GSN." (A91-92)

- "Mr. Economou . . . stated to Anatian that Coutts would be prepared to proceed with the [Commitment] using seven separate entities which would be located in the United States." (A94)

- "The Coutts Representatives informed Anatian that they had proposed and used a similar loan framework before, and that this was an acceptable means of treating Coutts' internal per client loan limitation." (A94-95)

- "Prior to June 14, 1996, and prior to Plaintiffs' pledge of any stock to Coutts in connection with the Commitment, defendant Coutts, through the Coutts Representatives, assured Plaintiffs that the New York Office had the authority to make the Commitment and to advance the funds pursuant to the Commitment without the approval of any other Coutts office." (A95)

- "Defendant Coutts through various of the Coutts Representatives, repeatedly confirmed the [Commitment] during the summer and fall of 1996 to Anatian, numerous employees of GSN, contractors of GSN, various television station owners, various media brokers, and various underwriters." (A95)

- "Coutts, in this regard, advised Anatian, and agreed with him, that the amount of Coutts' loans to the LLCs would not be contingent upon the value of Plaintiff's pledged USA Detergents stock. Also, on June 14, 1996, Anatian, through the LLCs, pledged to Coutts as partial security for said loans the equivalent of 70% (which was [subsequently] diluted to 55%) of his GSN stock. Coutts assigned a value of $75 million to all of the GSN stock and such value, as reduced by Coutts' loan margin rate on such stock at 85%, appeared in Plaintiffs' monthly

account statements through May 31, 1997. As a consequence of executing the June 14 Facility Agreements, pursuant to which Plaintiffs pledged their shares of USA Detergents and GSN stock as aforesaid, the [Commitment] became a binding and enforceable agreement." (A97-98)

- "[D]uring the period at the end of 1996 and the early part of 1997, the Coutts Representatives told Anatian for the first time that the entire balance of the [Commitment] required the approval of the Coutts London office and that the Anatian-related loans would have to be brought down from the total of $72,293,000 [which included $30 million of monies held by Coutts in CDs and other securities and never released to Plaintiffs] to an outstanding amount of less than $50 million." (A104)

In fact, the Second Circuit's complete lack of comprehension – if not willful dismissal – of the actual facts alleged is highlighted by its own brief recital of the facts of the case. In that recital, the Court repeatedly refers to personal loans to Anatian, and even goes so far as to differentiate between collateral pledged in support of these "personal" loans and that pledged by the LLCs, Appendix A at 4a-5a. However, *there were no personal loans made to Anatian.* All of the loans at issue were made to the LLCs, and were secured by stock in USA Detergents and GSN. (A95-95; A147-164)

In sum, the Second Circuit has first substituted its own, inaccurate version of Plaintiffs' claims for the claims that Plaintiffs actually asserted, and then dismissed these claims as deficient. In so doing, it has crafted a decision that, while

facially unassailable, results in an egregious miscarriage of justice and deprives the individual Plaintiff, who lost virtually his entire net worth as a result of Coutts' fraud, of any basis of redress in federal court.

Such a result is antithetical to any notion of justice. It is the keystone of our system of jurisprudence that each and every claim should be addressed as asserted. When an appellate court simply ignores the facts and law as actually pleaded and renders its decision as though the plaintiff has asserted wholly different claims, our most treasured principles of fair play are violated. It is respectfully submitted that this Court should not and must not permit such a cavalier mishandling of *any* plaintiff's claims. In order both to rectify an aberrant scar on our jurisprudence, and to allow these litigants their constitutional right to be heard on the actual claims they have asserted, *certiorari* should be granted.

CONCLUSION

For the reasons set forth above, *certiorari* should be granted in this matter.

Respectfully submitted

Rachamin Anatian
12 Lincoln Street
Apartment #3
Tel Aviv, Israel 67134
011-972-3-936-3232

Petitioner Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Decided September 17, 1999]

Nos. 98-9269, 98-9270

RACHAMIN ANATIAN, ATIK LLC, CHARLES GUNDY LLC, CHESED LLC, KABALLA LLC, KETER LLC, MAMASH LLC and VAN HARPER LLC,
Plaintiffs-Appellants,

v.

COUTTS BANK (SWITZERLAND) LTD., formerly known as COUTTS & CO. AG,
Defendant-Appellee.

MORDECHAI GAL-OLIVER and MARGARET GAL-OLIVER,
Plaintiffs-Appellants,

v.

COUTTS BANK (SWITZERLAND)
LTD., formerly known as)
COUTTS & CO. AG,)
Defendant-Appellee.)
)

(Argued: April 28, 1999)

Before: WALKER and POOLER, *Circuit Judges* and MOTLEY, *District Judge.*[*]

Appeal from memorandum order and judgment of the United States District Court for the Southern District of New York (Rakoff, J.) dismissing plaintiffs' federal securities fraud and antiracketeering claims with prejudice. Appellants claim that the district court erred in (1) dismissing their securities fraud claims for failure to state a claim under the Securities and Exchange Act of 1934 and failure to plead fraud with particularity; (2) dismissing their RICO claims for failure to allege a RICO "enterprise" sufficiently distinct from the RICO "person" and failure to plead fraud with particularity; and (3) dismissing the amended complaint without granting leave to amend.

Affirmed.

POOLER, *Circuit Judge*:

---

[*] The Honorable Constance Baker Motley, Senior United States District Judge of the Southern District of New York, sitting by designation.

Rachamin Anatian, seven limited liability companies he controls, Mordechai Gal-Oliver and Margaret Gal-Oliver ("plaintiffs") appeal from the memorandum order and judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*) dismissing their securities fraud and RICO allegations. We conclude that plaintiffs failed to state a claim for fraud in connection with the sale or transfer of a security and failed to allege a RICO "enterprise" in connection with the section 1962(c) claims sufficiently distinct from the RICO "person." In addition, we find that plaintiffs failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). Therefore, we affirm the judgment of the district court.

BACKGROUND

In reviewing the dismissal of a complaint, we must accept as true the facts alleged in the complaint and draw all reasonable inferences in plaintiffs' favor. *See Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 43 (2d Cir. 1997). The facts, unless otherwise noted, are as plaintiffs allege. In 1995, Rachamin Anatian became a client of Coutts Bank. He borrowed over $3.7 million from Coutts, secured by his shares of stock in USA Detergents. In the spring and summer of 1995, Anatian founded and became principal shareholder of a home shopping network known as Global Shopping Network, Inc. ("GSN"), and its successor Global Broadcasting Systems, Inc. ("GBS"). Anatian recruited Mordechai Gal-Oliver, an Israeli television personality, to be Chief Operating Officer of GSN.

Plaintiffs claim that between 1995 and 1997 Coutts representatives fraudulently induced Anatian to borrow $100

million from Coutts to purchase TV stations and supply the private equity element for the initial public offering of GSN. Coutts representatives also persuaded Anatian to create seven limited liability companies to which the bank could loan money for Anatian's benefit, while circumventing the internal and legal per-borrower lending limits. Coutts representatives assured Anatian that this arrangement would satisfy internal lending regulations and that the New York office had the authority to make such loans without approval of any other Coutts office. The Gal-Olivers also claim that Coutts representatives convinced them to borrow $2 million, half of which was retained in a Courts certificate of deposit, and half of which was used by the Gal-Olivers to buy GSN stock and a home in Brooklyn.

Anatian pledged his stock in USA Detergents as collateral for his personal loan and arranged for the limited liability companies to pledge GSN stock as collateral. Plaintiffs claim that Coutts falsely inflated the value of the GSN stock pledged as collateral for the loans in order to extend more credit to them. After extending millions of dollars in loans to Anatian, the related limited liability companies, and associates, the Coutts representatives allegedly reneged on their loan commitment, claiming that the Coutts home office put a halt to the arrangement. Without further credit, there could be no public offering, and GSN declared bankruptcy.

In August and October of 1997, Coutts sued Anatian, the limited liability companies, and the Gal-Olivers in two related state court actions for defaulting on more than $40 million in loan obligations. *See Anatian et al. v. Coutts Bank*, Nos. 97 CIV. 9280 (JSR), 97 CIV. 9492 (JSR), 1998 WL

526440, at *1 (S.D.N.Y Aug. 21, 1998). Shortly thereafter, plaintiffs commenced these actions in federal court alleging, among other things, violations of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b), and the civil provisions of the RICO statute, 18 U.S.C. §1961 et seq. Defendants moved pursuant to Fed. R. Civ. P. 12 to dismiss or stay the federal actions. On August 21, 1998, the district court dismissed plaintiffs' federal claims and declined to exercise jurisdiction over the remaining state claims, in light of the pending action in New York Supreme Court. *See Anatian,* 1998 WL 526440, at *4.

DISCUSSION

We review *de novo* the district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12 (b)(6) for failure to state a claim, accepting as true the factual allegations of the complaint. *See Chill v. General Elec.,* 101 F.3d 263, 267 (2d Cir. 1996). The dismissal will be upheld only if "plaintiff can prove no set of facts upon which relief may be granted." *See Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1127 (2d Cir. 1994). Furthermore, when a plaintiff alleges securities fraud, we must also consider the complaint in light of Fed. R. Civ. P. 9(b), which requires plaintiffs to plead fraud with particularity. *See id.* The complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* at 1128 (internal citations omitted).

Appellants argue that the district court erred in dismissing their securities fraud claim because Coutts' misrepresentations regarding the loan commitment were made

in connection with the purchase or sale of securities. We agree with the district court that plaintiffs failed to state a claim for securities fraud and failed to plead fraud with particularity.

> The purpose of § 10(b) and Rule 10b-5 is to protect persons who are deceived in securities transactions - - to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be.

Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984). Even if plaintiffs' allegations were true, the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment do not pertain to the purchase or sale of a security. The district court properly rejected plaintiffs' attempt "to transform what are in essence breach of contract claims or breach of fiduciary duty claims only tangentially involving securities into securities fraud claims." *Anatian*, 1998 WL 526440, at *2. Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark. It is not sufficient to allege fraud in a transaction in which a security is a part. *See Chemical Bank*, 726 F.2d at 943. Therefore, we affirm the dismissal of the securities fraud claim.

In addition, we find that Judge Rakoff properly dismissed both the securities fraud and RICO claims for failure to plead fraud with particularity. Alleging that Coutts Bank made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud. Nor were the RICO predicate acts of mail and wire fraud alleged with sufficient particularity. Even if we were to find that the time and content of those communications met the Rule 9(b) standard, plaintiffs' claim must be dismissed because they failed to allege how those statements were fraudulent.

Appellants also argue that the district court erred in dismissing their RICO claims. They claim the New York office of Coutts Bank engaged in a business practice of attempting to circumvent internal and legal lending limits and extending credit without authority to do so. To state a RICO claim, a plaintiff must plead "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L.v. Imrex Co.*, 473 U.S. 479, 496 (1985). In addition, a plaintiff must plead injury to business or property as a result of the RICO violation. *See id; accord* 18 U.S.C. §1964(c).

We affirm the dismissal of the RICO claims for the reasons set forth by the district court. In addition to the Rule 9(b) infirmities, we agree with the district court that plaintiffs failed to allege an "enterprise" sufficiently distinct from the RICO "person" with respect to the claims based on section 1962(c). "[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985). Plaintiffs alleged that Coutts was an "enterprise" within the

meaning of sections 1961 and 1962 as well as a "person" as defined in section 1961(3). Plaintiffs cannot circumvent the distinctness requirement "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).

Finally we note that the district court was not obliged to grant plaintiffs leave to amend their complaint. While we recognize that leave to amend should be freely granted, especially in the case of a Rule 9(b) dismissal, *see Chill,* 101 F.3d at 271, we will not "deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought." *Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 664-65 n. 3 (2d Cir. 1997) (quoting *Shields v. Citytrust Bancorp., Inc.* 25 F.3d at 1132). Here, plaintiffs made no attempt to seek leave to amend their amended complaint either before or after the district court's decision. Nor was there any showing as to how plaintiffs might amend their complaint to cure their pleading deficiencies, especially in light of the insufficiency of facts to support a claim. Therefore, we reject plaintiffs' claim that the district court erred in not granting leave to amend. We have considered appellants' remaining contentions and find them to be without merit.

CONCLUSION

For the foregoing reasons we affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Dated August 20, 1998]

Nos. 97 Civ. 9280 (JSR)
97 Civ. 9492 (JSR)

RACHAMIM ANATIAN, ATIK LLC, CHARLES GUNDY LLC, CHESED LLC, KABALLA LLC, KETER LLC, MAMASH LLC, and VAN HARPER LLC,
Plaintiffs,

v.

COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

MORDECHAI GAL-OLIVER and MARGARET GAL-OLIVER,
Plaintiffs,

v.

COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

The plaintiffs in these two related cases -- Rachamim Anatian, seven limited liability companies he controls, his associate Mordechai Gal-Oliver, and Mr. Gal-Oliver's wife Margaret -- previously defaulted on more than $40 million in obligations they owed to Coutts Bank. Coutts thereupon sued them for default in two related New York State actions commenced respectively in August and October 1997. Plaintiffs counterattacked by commencing the instant federal actions against Courts in December 1997, alleging breach of contract, breach of the contractual obligation of good faith and fair dealing, common law fraud, negligent misrepresentation, promissory estoppel, violation of the antifraud provisions of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, and violations of the RICO statute, 18 U.S.C. § 1961 et seq. The Anatian plaintiffs also sought a declaration that the loan contracts on which Coutts is suing them in State court are void for violation of federal bank Regulation U, 12 C.F.R. § 221, and unspecified New York State banking regulations.

Defendant promptly moved under Rule 12, Fed. R. Civ. P., to dismiss or stay these federal actions. Following review of the parties' written submissions and oral arguments, the Court telephonically advised the parties on March 6, 1998 that defendant's motions would be granted. This Memorandum Order will serve formally to confirm those rulings and briefly state the reasons therefor.

The gist of the plaintiffs' inordinately lengthy Complaints[1] is to allege that they were fraudulently induced by Coutts to borrow too much money and to believe that they could borrow still more. The larger of the loans, of approximately $57 million, resulted from negotiations between plaintiff Rachamim Anatian, the founding and principal shareholder of a company called Global Shopping Networks, Inc. ("GSN") and its successor Global Broadcasting Systems, Inc. ("GBS"), and a group of Courts employees referred to as the "Coutts Representatives." See Anatian Complaint at ¶¶ 2, 17, 25, 53, 68. According to the Anatian Complaint, between 1995 and 1997 the Coutts Representatives fraudulently induced Anatian to help them circumvent Coutts' internal loan limitations by, inter alia, creating puppet entities (the seven limited liability plaintiffs), to which Coutts could then make excessive loans for Anatian's benefit. See, e.g., id. at ¶¶ 36-52. The alleged purpose of this scheme was to enable Anatian and his associates to borrow the estimated $100 million or more they needed to purchase certain television stations and take their proposed televised-shopping network public, while in the process expanding Courts' loan business in North America. See id. at ¶¶ 24, 28-33. However, after making more than $57

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[1] The First Amended Complaint of the Anatian plaintiffs ("Anatian" Complaint) consists of 194 paragraphs spread over 53 pages, plus 46 pages of annexed exhibits. The First Amended Complaint of the Gal-Oliver plaintiffs ("Gal-Oliver" Complaint) consists of 145 paragraphs spread over 33 pages, plus 8 pages of annexed exhibits.

million in loans to Anatian and related entities and associates,[2] the Coutts Representatives refused to fulfill their alleged commitment to extend still further credit, contending in effect that the commitment had been countermanded by Coutts' home office. See id. at ¶¶ 70-79. The alleged result was not only to derail the proposed public offering, see id. at ¶¶ 90-92, but ultimately to force GBS into bankruptcy, see id. at ¶ 93.

One of Anatian's associates in these ventures was Mordechai Gal-Oliver, a sometime rabbi and occasional Israeli television commentator, who became Chief Operating Officer of GSN. See Gal-Oliver Complaint at ¶¶ 3, 9-10, 56. According to the allegations of the Gal-Oliver Complaint, which largely echo those of the Anatian Complaint, Gal-Oliver and his wife were enticed by the Courts Representatives' fraudulent representations to borrow $2 million from Coutts, see id. ¶¶ 41-58, half of which was retained in a Coutts certificate of deposit, see id. ¶ 52, and the remainder of which was used by the Gal-Olivers to purchase stock in Anatian's fledgling network and a home for themselves in Brooklyn, see id. ¶ 58. Further, according to the Gal-Oliver Complaint, the Coutts Representatives, knowing the Gal-Olivers lacked sufficient collateral for the

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[2] Of the $57 million that defendant loaned to Anatian and/or related entities in June 1996, $33 million was used to retire previous loans to Anatian and his associates. See Anatian Complaint ¶¶ 27, 53. By March 1997, following subsequent loans to Anatian and the use of certain loan proceeds to reduce the outstanding debt, the balance owed to defendant by Anatian and/or the related entities was approximately $41 million, see id. ¶ 75, 80-84.

loan, created sham collateral by falsely valuing the plaintiffs' GSN shares (which they had pledged as collateral) at an inflated amount of $1.59 million. See id. ¶ 61. Thereafter, as part of the fall-out resulting from the Coutts Representatives' alleged failure to honor their commitment to extend further credit to Anatian, the Gal-Olivers defaulted on their loan. See id. ¶¶ 66-70.

These allegations might more naturally be read to describe a fraud on the Coutts Bank than a fraud by it. But assuming arguendo that plaintiffs' allegations, read most favorably to them, make out State claims of fraud, contractual breach, and the like against Coutts, they still fail to state a federal cause of action.

As to the purported federal claims brought under the federal securities laws, those laws are intended "to protect persons who are deceived in securities transactions -- to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something" for an inadequate price. Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984) (Friendly, J.). For that reason, courts have repeatedly rejected attempts, such as those presented here, to transform what are in essence breach of contract claims or breach of fiduciary duty claims only tangentially involving securities into securities fraud claims. See Kramer v. Time Warner Inc., 937 F.2d 767, 776 (2d Cir. 1991) (plaintiff "may not transform [a] state law breach of contract or fiduciary duty action into a fraud claim under the federal securities laws"); Drexel Burnham Lambert Inc. v. Saxony Heights Realty Assocs., 777 F. Supp. 228, 235 (S.D.N.Y. 1991) (dismissing

securities fraud claim amounting to a "contract dispute dressed up in the language of fraud").

Here, the fraudulent misrepresentations on which plaintiffs chiefly rely -- relating to the authority of Coutts Representatives to evade or override Coutts' internal loan requirements and to their failure to make good on their loan commitments, see, e.g., Anatian Complaint ¶¶ 37, 48-49, 67, 71, 75, 85; Gal-Oliver Complaint ¶¶ 21, 31, 46-47 -- do not pertain to any securities involved in a purchase or sale, and can not support a claim for securities fraud. See Chemical Bank, 726 F.2d at 943; Levitiin v. PaineWebber, Inc., 923 F. Supp. 325, 328-329 (S.D.N.Y. 1996). While the alleged misrepresentations regarding the value of plaintiffs' stock pledged as collateral, see, e.g., Anatian Complaint ¶¶ 54, 119; Gal-Oliver Complaint ¶¶ 61, 75, might in some circumstances state a securities fraud, here there is no non-conclusory allegation that the plaintiffs were somehow deceived as to the true value of their own stock. Rather, despite some broad language in the Complaints, the only well-pleaded victim of the alleged misrepresentations is, if anyone, the Coutts home office, and so there is no fraud on the plaintiffs.

Moreover, despite the inordinate length of these Amended Complaints, nowhere do they come close to meeting the particularity requirements of Rule 9(b), Fed. R. Civ. P., e.g., that allegations of fraud must specify (1) the statements alleged to be fraudulent, (2) the speaker, (3) where and when the statements were made, and (4) why the statements were fraudulent. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). Nor do they meet the particularity and intent requirements imposed by the Private

Securities Reform Act of 1995. See, e.g., In Re Baesa Securities Litigation, 969 F. Supp. 238, 242 (S.D.N.Y. 1997). Given the length of the Complaints and the fact that plaintiffs have previously amended them, it cannot be reasonably supposed that plaintiffs could cure these deficiencies through further amendments.

Accordingly, the securities fraud claims must be dismissed with prejudice. The RICO claims, suffering from similar Rule 9(b) infirmities, must likewise be dismissed. Moreover, with respect to the RICO claims premised on section 1962(c), plaintiffs have failed to allege a RICO "enterprise" that is sufficiently distinct from the RICO "person" to state a claim under that provision. See Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1063 (2d Cir. 1996).

Finally, as to the Anatian plaintiffs' request for a declaration that their loan agreement with Coutts is unenforceable because in violation of Regulation U, 12 C.F.R. § 221.3(a), that regulation applies only to loans made for the purpose of purchasing or carrying securities, see Freeman v. Marine Midland Bank, 494 F.2d 1334, 1338 (2d Cir. 1974), whereas, as plaintiffs now concede, the Anatian loans were for the purpose, directly or indirectly, of purchasing assets, chiefly the television stations, see Plaintiffs' Brief at 26; see also Anatian Complaint ¶¶ 37, 53d, 73.[3]

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[3] While the Anatian Complaint does allege that a portion of the loans was temporarily to be used to purchase stock in another of Anatian's own enterprises, USA Detergents, see Anatian Complaint ¶¶ 60-61, they go on to allege that this was simply for the purpose of putting more money in his pocket to purchase assets,

Having dismissed all of the plaintiffs' federal claims, the Court turns to the state claims. As to the state claims in the Gal-Oliver Complaint (which does not allege diversity of citizenship), the Court declines to exercise pendent jurisdiction. See 28 U.S.C. § 1967(c); Morse v. Univ. of Vermont, 973 F.2d 122, 127 (2d Cir. 1992). As to the state claims in the Anatian Complaint (which does allege diversity), the Court, upon review of the earlier-filed pending state lawsuit, abstains from the exercise of jurisdiction, since "'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' counsels such abstention." Arkwright-Boston Manuf. Mutual Ins. Co. v. City of New York, 762 F.2d 205, 210 (2d Cir. 1985) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)) (brackets omitted).

In reaching this determination, the Court has considered, inter alia, the factors most typically bearing on the question of such abstention, viz.: (1) the assumption of jurisdiction by either court over any res or property, (2) the inconvenience of the federal forum, (3) the avoidance of piecemeal litigation, (4) the order in which jurisdiction was obtained, (5) whether state or federal law supplies the rule of decision, and (6) whether the state court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction. See Colorado River, 424 U.S. at 818; Burnett v. Physician's Online, Inc., 99 F.3d 72, 76 (2d Cir. 1996. While the first two factors are irrelevant in the instant context, the other factors are highly relevant, since the lawsuit

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see id. ¶ 61.

between the defendant and the Anatian parties earlier filed in New York State court directly or by necessary implication covers virtually all the issues raised by the state claims brought in these federal cases and thus the concurrent pendency of the state and federal actions clearly presents the danger of "duplicative simultaneous litigation," DeCisneros v. Younger, 871 F.2d 305, 308 (2d Cir. 1989), that would "would waste judicial resources," Arkwright, 762 F.2d at 211.

Permitting the issues raised in the Anatian plaintiffs' state law claims to be litigated simultaneously in two fora would inevitably present the possibility of inconsistent disposition of such issues, which "would breed additional litigation on assertions of claim and issue preclusion." Id. Furthermore, while neither court has rendered a decision on the merits of any issue, see DeCisneros, 871 F.2d at 308, the commencement of the state court action by service of a summary judgment motion makes likely a rapid disposition of the claims presented there. Conversely, the motion to abstain in these actions is being considered at the outset of the proceedings, before any discovery has occurred and well before any motion directed to the merits might be anticipated.

Perhaps most tellingly, now that the federal claims of the Anatian plaintiffs have been dismissed, state law provides the rule of decision with respect to the issues raised in the remaining (state law) claims, strongly supporting abstention in favor of the state court action. See id. at 308-309; American Alliance Ins. Co. v. Eagle Ins. Co., 961 F. Supp. 652, 659 (S.D.N.Y. 1997). For the same reason it is clear that the state court action will adequately protect plaintiff'

rights. See Arkwright, 762 F.2d at 211 (state court better situated to decide issues of local and state law).

Accordingly, the Court abstains from the exercise of jurisdiction over the Anatian state law claims, which are dismissed without prejudice to the right of any party to seek to reopen the action as to those claims upon disposition of the state court action. See Burnett, 99 F.3d at 77.

In sum, for the foregoing reasons, both the Gal-Oliver complaint and the Anatian complaint are hereby dismissed. Clerk to enter judgment.

SO ORDERED.

/s/_____
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
August 20, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed August 25, 1998]

Nos. 97 Civ. 9280 (JSR)
97 Civ. 9492 (JSR)

RACHAMIM ANATIAN, ATIK LLC, CHARLES GUNDY LLC, CHESED LLC, KABALLA LLC, KETER LLC, MAMASH LLC, and VAN HARPER LLC,
Plaintiffs,

v.

COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

MORDECHAI GAL-OLIVER and MARGARET GAL-OLIVER,
Plaintiffs,

v.

COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

ORDER

Defendant having moved to dismiss the Complaint or stay the federal actions pursuant to FRCP 12, and the said motion having come before the Honorable Jed S. Rakoff, United States District Judge, and the Court thereafter, on August 20, 1998 having issued its Memorandum Order granting defendant's motion to dismiss the Complaint in both actions and directing the Clerk to enter judgment accordingly, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Order dated August 20, 1998 defendant's motion to dismiss the Complaints in both action be and hereby is granted.

DATED: New York, New York
August 24, 1998

JAMES M. PARKISON
Clerk of Court

By: /s/_____
Deputy Clerk

This document was entered on the filed docket on 8/25/98.

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

(2)

No. 99-1037

IN THE

Supreme Court of the United States

RACHAMIM ANATIAN, *et al.*,

Petitioners,

v.

COUTTS BANK (SWITZERLAND) LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP H. SCHAEFFER
Counsel of Record
J. CHRISTOPHER SHORE
WHITE & CASE LLP
Attorneys for Respondent
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

157569

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals erred in affirming the dismissal of Petitioners' alleged federal securities and racketeering claims against Respondent pursuant to Rules 9(b) and 12(b) of the Federal Rules of Civil Procedure ("FRCP"), where

(i) the allegations of the dismissed pleading failed to raise a "strong inference" of scienter on the part of Respondent, as explicitly required by the Private Securities Litigation Reform Act of 1995 the ("PSLRA");

(ii) the dismissed pleading lacked any non-conclusory allegations of fraud which specified the alleged misstatements or omissions by Respondent with the particularity required by the PSLRA or FRCP 9(b); and

(iii) the alleged frauds which formed the basis of Petitioners' federal securities fraud and racketeering claims were more properly characterized as state law claims for breach of contract which should have been asserted in a parallel state court litigation.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Coutts Bank (Switzerland) Ltd., is wholly owned by Natwest PLC, a publicly held company.

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STATUTORY PROVISIONS INVOLVED

Securities Exchange Act of 1934,
15 U.S.C. § 78u-4

* * *

(b) Requirements for securities fraud actions.

(1) *Misleading statements and omissions.* In any private action arising under the chapter in which the plaintiff alleges that the defendant —

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) *Required state of mind.* In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that

> the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

STATEMENT OF THE CASE

This Petition concerns an affirmance by the United States Court of Appeals for the Second Circuit of an order of the United States District Court for the Southern District of New York (Rakoff, J.) entered pursuant to FRCP 9(b) and 12(b)(6). In particular, this Petition concerns only that portion of the Second Circuit's affirmance which approved the District Court's dismissal of Petitioners' alleged federal securities law and racketeering claims against Respondent on the basis that Petitioners had failed to state a cognizable federal claim.

In support of their present request for a writ of certiorari to review that limited dismissal and affirmance, Petitioners have failed to present any "compelling reason" as to why the Circuit's ruling should be reversed, *see* Supreme Court Rule 10, or any substantive federal issue which would raise the Circuit's disposition "beyond the academic or episodic." *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1954); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing

conflict of opinion and authority between the circuit courts of appeal"). Petitioners cite no conflicts in the existing federal law regarding the dismissal of federal securities or racketeering claims, nor do they cite any error in the Circuit's formulations of federal tort principles as they relate to the dismissed claims. Indeed, Petitioners concede that "the Second Circuit issued what, on its face, appears to be a proper statement of law." Petition at 10.

At its heart, the Petition is nothing more than Petitioners' attempt to reargue the Circuit's disposition solely on the basis that the Circuit was purportedly "cavalier" in its review of the record before it. *Id.* As set forth herein, there was nothing in the slightest bit inappropriate, cavalier or "shocking" about the Second Circuit's thorough review and reasoned interpretation of the record. Further, Petitioners have not pointed to any "error" which would have had a material effect on the disposition ultimately reached by the Circuit. Thus, even if this Court were willing to entertain a reargument of the Circuit's disposition, dismissal of the complaint at issue would nevertheless remain entirely appropriate. The Petition should therefore be denied.

A. Background

This action involves a series of loans made in 1996 and 1997 by Respondent Coutts Bank (Switzerland) Ltd. f/k/a Coutts & Co AG ("Coutts"), a British private bank, to a consortium of seven limited liability companies under the control of Mr. Rachamim Anatian — Atik LLC, Charles Gundy LLC, Chesed LLC, Kaballa LLC, Keter LLC, Mamash LLC and Van Harper LLC (collectively, the

"LLCs"). Appendix at 11a.[1] These loans to the LLCs (the "Loans") were evidenced by a series of promissory notes signed by Mr. Anatian on behalf of the LLCs. (A 225-265). Repayment obligations under the notes were secured by collateral pledged by LLCs to Coutts as well as by Mr. Anatian's written, personal guaranties of all sums owing from the LLCs to Coutts. (A 196-207). The collateral pledged by the LLCs consisted almost entirely of Mr. Anatian's former stock holdings in an unrelated, publicly-traded company which Mr. Anatian had helped to found. Appendix at 4a.

As set forth in the written loan commitment letters governing the terms of the Loans to the LLCs (the "Loan Agreements"), each of the Loans was advanced for use in the LLCs' development of various businesses with which Mr. Anatian was involved. (A 166-194). One such business venture was a television shopping network known as Global Shopping Network, Inc. ("GSN"). When a scheduled initial public offering for GSN debt failed in the Spring of 1997, Mr. Anatian and the LLCs defaulted on their obligations to Coutts, leading to the instant dispute. Appendix at 4a.

In August 1997, Coutts initiated a summary collection proceeding against Mr. Anatian and the LLCs in the Supreme Court of the State of New York, County of New York (the "State Court Action"). By that action, Coutts sought to recover the balances of the Loans outstanding at the time of suit, as evidenced by the various promissory notes made by the LLCs and Mr. Anatian's personal guaranties. (A 145-164). This summary proceeding ultimately resulted in a judgment entered against the LLCs and Mr. Anatian in

1. Citations to "Appendix at ##" are to the pages of the Appendix attached to the Petition. Citations to "(A ##)" are to the pages of the Joint Appendix filed in the Second Circuit.

the full amount sought by Coutts. That judgment has now been affirmed by the Appellate Division, First Department of the New York State Supreme Court, and leave to appeal to the New York State Court of Appeals has been denied.

The action which is the subject of this Petition arose soon after Coutts commenced the State Court Action, when Mr. Anatian and the LLCs attempted to remove that action by filing a notice of its removal to the United States District Court for the Southern District of New York. The action was later remanded because Mr. Anatian was a New York State resident at the time of removal. (A 272-274). Only after that remand did Mr. Anatian and the LLCs attempt a *de facto* removal of the State Court Action by commencing the federal action at issue here (the "District Court Action").

The gravamen of Petitioners' complaint filed in the District Court Action was that Coutts had aliegedly breached certain oral loan commitments to Mr. Anatian and the LLCs and that, because of such alleged breaches, both he and his companies should be forgiven any obligation to repay the Loans. As a means of invoking the subject matter jurisdiction of the federal courts to hear that complaint (and avoid litigating such issues in the State Court Action), Petitioners alleged further that Coutts' failure to follow through with its alleged oral commitment for a loan of an unspecified amount constituted a violation of several federal regulatory statutes, including 15 U.S.C. § 78j, 17 C.F.R. § 240.10b-5 ("Rule 10b-5") and Sections 1962 (a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (the "RICO Statute").

B. The Amended Complaint

Petitioners' amended complaint against Coutts (the "Amended Complaint"), which was the pleading ultimately dismissed by the District Court, is included at pages A 82-A 137 of the Joint Appendix submitted to the Second Circuit. The pleading consists of 195 paragraphs of allegations and nine designated causes of action against Coutts. Its *ad damnum* clause requests compensatory and punitive damages from Coutts in excess of $1.5 billion. (A 134-136).

In the pleading, Petitioners admitted that they had accepted the Loans from Coutts pursuant to the Loan Agreements and further conceded that all Loans were secured by a written pledge of shares in GSN (the nascent cable company) and USA Detergents, Inc. ("USAD"), a publicly-traded company which Mr. Anatian had helped to found years earlier. (A 96-100). Notwithstanding the existence of integrated, written agreements and security arrangements, Petitioners alleged that certain unnamed officers of Coutts (referred to in the Amended Complaint as the "Coutts Representatives") entered into a contemporaneous *oral* agreement for an unsecured, non-recourse loan of an unspecified amount between $100 million and $150 million (the "Coutts Commitment"). Petitioners alleged further as follows:

> Coutts represented that the Coutts Commitment was definite and absolute and Coutts would not require further security for the Coutts Commitment.
>
> * * *

> Coutts made misrepresentations of fact in stating (i) that the Coutts Commitment was absolute and was not subject to the approval of any other entity or person, including but not limited to the London office of Coutts, and (ii) that the Coutts Representatives had the authority to make the Coutts Commitment and to release the funds thereunder, when, on information and belief, the Coutts Representatives did not have the authority to make the Coutts Commitment or to distribute funds thereunder and, on information and belief, no person or entity with authority was informed of the Coutts Commitment at the time it was made. (A 116, 119).

It was Coutts' failure to honor this "Coutts Commitment," Petitioners further alleged, that led to the collapse of their business ventures and corresponding inability to repay the Loans. Appendix at 3a-4a. In other words, as the District Court noted, the theory of the Amended Complaint was that Coutts had loaned Mr. Anatian and his companies millions of dollars as part of a "scheme" to take possession of stock in USAD and GSN (the "Stock") which was, at all times, worth substantially less than the Loans advanced. *Id.* at 14a.

Thus, as their Third and Fourth Claims in the District Court Action (the "10b-5 Claims"), Petitioners alleged that Coutts had intended to deprive them of the value of the Stock by advancing the Loans with the expectation that the LLCs would default and forfeit their collateral. This "fraud" in inducing the pledge of stock, Petitioners contended, constituted a violation of Rule 10b-5. (A 115-120). As their Seventh and Eighth Claims (the "Civil RICO Claims"), Petitioners alleged that these very same activities — the

failure to follow through with an alleged oral promise to advance an unspecified amount of credit — coupled with the use of interstate mails and wires constituted violations of the RICO Statute. (A 125-134).

C. The Dispositions Below

Coutts moved before the District Court to dismiss both the 10b-5 Claims and the Civil RICO Claims on the grounds that neither stated a claim upon which relief could be granted. Coutts also requested that the District Court abstain from hearing any of the state law claims alleged in the Amended Complaint in deference to the State Court Action. (A 139-40). Mr. Anatian and the LLCs opposed Coutts' motions.

The District Court heard extended oral argument of Coutts' dismissal motion in February 1998. (A copy of the transcript of the oral argument is at A 731-773.) The District Court thereafter dismissed both the 10b-5 Claims and the Civil RICO Claims with prejudice and without leave to replead and elected to abstain on the state law claims in deference to the State Court Action. (A 784). With respect to the alleged federal claims for relief, the District Court stated,

> These allegations [of the Amended Complaint] might more naturally be read to describe a fraud on the Coutts Bank than a fraud by it. But assuming *arguendo* that plaintiffs' allegations, read most favorable to them, make out State claims of fraud, contractual breach and the like against Coutts, they still fail to state a federal cause of action.

* * *

Here, the fraudulent misrepresentation on which plaintiffs chiefly rely – relating to the authority of Coutts Representatives to evade or override Coutts' internal loan requirements and to their failure to make good on their loan commitments — do not pertain to any securities involved in a purchase or sale, and cannot support a claim for securities fraud. While the alleged misrepresentations regarding the value of plaintiffs' stock pledged as collateral might in some circumstances state a securities fraud, here there is no non-conclusory allegation that the plaintiffs were somehow deceived as to the true value of their own stock. Rather, despite some broad language in the Complaints, the only well-pleaded victim of the alleged misrepresentations is, if anyone, the Coutts home office, and so there is no fraud on the plaintiffs.

Moreover, despite the inordinate length of these Amended Complaints, nowhere do they come close to meeting the particularity requirements of Rule 9(b) . . . Nor do they meet the particularity and intent requirements imposed by the Private Securities Reform Act of 1995. Given the length of the Complaints and the fact that plaintiffs have previously amended them, it cannot be reasonably supposed that plaintiffs could cure these deficiencies through further amendments.

Accordingly, the securities fraud claims must be dismissed with prejudice. The RICO claims,

> suffering from similar Rule 9(b) infirmities, must likewise be dismissed. Appendix at 13a-15a (citations omitted).

On appeal, the Second Circuit affirmed the District Court's dismissal of the alleged federal claims, stating as follows:

> Even if plaintiffs' allegations were true, the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment do not pertain to the purchase or sale of a security. The district court properly rejected plaintiffs' attempt "to transform what are in essence breach of contract claims or breach of fiduciary duty claims only tangentially involving securities into securities fraud claims. "Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark. It is not sufficient to allege fraud in a transaction in which a security is a part. Therefore, we affirm the dismissal of the securities fraud claim.
>
> In addition, we find that Judge Rakoff properly dismissed both the securities fraud and RICO claims for failure to plead fraud with particularity. Alleging that Coutts Bank made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud. Nor were the RICO predicate acts of mail and wire fraud alleged with sufficient particularity. Even if we were to find that the time and content of those

communications met the Rule 9(b) standard, plaintiffs' claim must be dismissed because they failed to allege how those statements were fraudulent. *Id.* at 6a-7a (citations omitted).

REASONS FOR DENYING THE WRIT

A. THE AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF UNDER RULE 10b-5

As their central critique of the affirmance below, Petitioners accuse the Second Circuit of having had a "complete lack of comprehension" of the "actual facts" underlying their Rule 10b-5 Claims. Petition at 17. As noted above, the Second Circuit can hardly be accused of a "complete lack of comprehension" of such claims, having correctly and cogently summarized them as pertaining to "the authority of the Coutts representatives to loan money in excess of the Bank's requirements and the failure to carry out the loan commitment." Appendix at 5a-6a. Even assuming *arguendo* that the Second Circuit had misperceived the gravamen of Petitioners' Rule 10b-5 Claims, as set forth herein Petitioners have cited no authority to support their contention that the "actual facts" that they now present to this Court could ever add up to an actionable violation of the federal securities laws.

1. The 10b-5 Claims Failed to Raise an Inference of Scienter on the Part of Coutts

Under the heightened pleading requirements adopted in the PSLRA, a putative securities law claimant must now, "with respect to each act or omission alleged to violate [the

anti-fraud provisions of the Securities Exchange Act of 1934], state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (1998) (emphasis added). There can be little doubt that, under this pleading standard, the Amended Complaint could not possibly support any inference that Coutts acted with *scienter* towards Mr. Anatian or his LLCs. The theory now advanced by the Petitioners is that unnamed "Coutts Representatives" "knew" that, in the absence of up at least $100 million in financing, GSN would be worthless and Petitioners would be unable to repay any Loans. Petition at 13. Notwithstanding this fact, Petitioners claim that the unnamed "Coutts Representatives" orally represented that Coutts would provide the subject financing not knowing whether or not the bank could ever follow through with such a commitment. Based on these allegations, Petitioners now seek an inference that, for some unstated reason, the "Coutts Representatives" gave Petitioners millions of dollars of credit without "informing [any] person or entity with authority" and without caring whether the LLCs would ever be able to repay the sums owed. As its *coup de grace*, these "Coutts Representatives" then secured the Loans with the very stock that it knew would be worthless once their "scheme" bore fruit.

As this Court stated in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 596-97 (1986), if a defendant has no "rational economic motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of a conspiracy." Following this Court's lead, Courts in the Second Circuit have been loathe to draw inferences of fraudulent or conspiratorial intent which "defy logic" or otherwise defy "economic reason." *See, e.g., Shields v.*

Cititrust Bancorp, Inc., 25 F.3d 1124, 1127 (2d Cir. 1994) (dismissed 10b-5 claim was contrary to defendants' "economic self-interest"); *Laro, Inc., v. Chase Manhattan Bank*, 866 F. Supp. 132, 137 (S.D.N.Y.), *aff'd*, 60 F.3d 810 (2nd Cir. 1994).

In this case, despite requests by both the District Court and the Second Circuit, Petitioners have failed to offer any explanation as to why their theory of Coutts' behavior made "economic sense." Clearly, if Coutts wanted the Stock, it could have purchased it on the market for far less than the very dear price of $71 million. (Petitioners have conceded that, at almost all times, the amount loaned exceeded the market value of the stock. (A 97).) Nor is it reasonable to infer that Coutts risked millions of its own dollars to earn relatively insignificant interest and fees on the Loans. *See, e.g., Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). The lack of any rational basis to infer that Coutts in fact advanced the Loans as a means of obtaining the Stock for less than fair consideration led both the District Court and the Second Circuit to conclude that, if Petitioners had any claims against Coutts regarding an alleged Coutts Commitment, such claims were for common law breach of contract, not securities fraud. Appendix at 6a, 13a-14a. In that regard, the courts have universally held that the failure to carry out a promise in a securities action is a breach of contract, not a fraud. *See, e.g., Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993) (failure to carry out promise in a securities transaction is normally a breach of contract and not a fraud); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 776 (2d Cir. 1991) (collecting cases; plaintiff cannot transform state law breach of contract or fiduciary duty claim into securities fraud claim); *cf. Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) (breach of fiduciary

duty, without more, does not constitute violation of Rule 10b-5).

2. The "Misrepresentations" Complained of Were Not Otherwise Made "In Connection With" a Purchase or Sale of Securities

The second fatal defect in Petitioners' 10b-5 Claims, the Second Circuit noted, was the lack of any appreciable link between the LLCs' pledge of Stock to support secured loan obligations and Coutts' alleged misrepresentation regarding further unsecured loans. Appendix at 4a. With respect to any claim under Rule 10b-5, the misrepresentations complained of must be made "in connection with" the purchase or sale of securities. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). As Judge Friendly once explained, the purpose of the requirement "is to protect persons who are deceived in securities transactions – to make sure that buyers of securities get when they think they are getting." *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir.), *cert. denied*, 469 U.S. 884 (1984).

Even under Petitioners' newest theory presented in their Petition, the Amended Complaint failed to provide any nexus between the "misrepresentation" claimed — *i.e.*, the Coutts Commitment — and the "value" of the USAD and GSN securities at issue. Appendix at 6a. There were no allegations that the performance or non-performance of the Coutts Commitment had anything to do with the value of the stock in USAD, which was a wholly independent venture from GSN. Nor for that matter was there any claimed "loss causation" between the non-performance of the Coutts Commitment and any drop in the price of USAD shares. *See Citibank, N.A. v. K.H. Corp.*, 968 F.2d 1489, 1495

(2d Cir. 1992); *Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d 742, 747 (2d Cir. 1992). As for the pledge of GSN stock, assuming *arguendo* that the Coutts Commitment might have had an impact on the *future* value of the company as a whole, Petitioners have failed to point to any authority in which a court has held such a link sufficient to support a Rule 10b-5 claim. Indeed, were such claims to be deemed sufficient for the purposes of stating a cause of action under Rule 10b-5, any lender's breach of a margin loan agreement would potentially be transformed into a federal tort claim.

3. Petitioners Failed to Plead Their Rule 10b-5 Claims with the Requisite Particularity

Finally, as both the Second Circuit and the District Court observed, the Rule 10b-5 Claims did not come close to meeting the particularity requirements of the PSLRA or FRCP 9(b) — *i.e.*, the identification of the fraudulent statement(s), the speaker(s), and the time and location of the statement(s). Appendix at 7a, 14a-15a.

In that regard, the Amended Complaint is devoid of any specifics of the "Coutts Commitment," such as interest terms, repayment terms, conditions precedent, terms of default, or even the amount of the Oral Commitment, which is described alternatively as "at least $100 million," "$150 million," "$100 million to $150 million" and "up to $150 million." (A 13, 30, 34, 345, 415, 750). Similarly defective was Petitioners' repeated use of phrases such as "Coutts," "Coutts Representatives," "various Coutts representatives," "Coutts representative who proposed and sanctioned this loan framework," and "Coutts, through its representatives," (*e.g.*, A 91-92, 94-95), all of which were clearly insufficient to provide Coutts with notice of the identities of the alleged

wrongdoers. Petitioners' conflicting allegations that the Coutts Commitment was made either in the first half of 1996 or during the Summer or Fall of 1996, (A 91, 95), were particularly damning. To the extent that the alleged misrepresentations were made *after* Petitioners had already pledged the Stock in June 1996, there was no "causation in fact" linking the allegedly fraudulent statement to the "sale" of the securities. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 154 (1972). Given the foregoing, the Second Circuit can hardly be gainsaid for refusing to permit Petitioners to advance their Rule 10b-5 Claims against Coutts.

B. THE AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF UNDER THE RICO STATUTE

The alleged basis for Petitioners' Civil RICO claims appeared in paragraph 165 of the Amended Complaint:

> Coutts entered into a scheme to defraud Plaintiffs, as set forth in detail at paragraphs 37, 48-50, 54, 67 and 70, above. In particular, in order to induce Plaintiffs to sign the Facility Agreements, to pledge stock to Coutts, and to pay the interest differential, Coutts represented to Plaintiffs it would make the loans, described and represented as the Coutts Commitment, to the seven LLCs; that the New York Office of Coutts had the authority to make such loans and to release the funds thereunder to Plaintiffs without the consent of any other entity or person, including, but not limited to the London office of Coutts; and that that the [GSN Stock] had a value far greater than its actual value.

(A 126). The Amended Complaint further contained "boilerplate" allegations that Coutts mailed account statements to Borrowers and made telephone calls to them to "confirm" the "frauds" (A 127); that the "foregoing" predicate acts constitute the required "continuity plus relationship" (A 128); and that Coutts may engage in other and further illicit "business practices" in the future. (A 128). As to these claims, the Second Circuit affirmed their dismissal "for the reasons set forth in the District Court," *i.e.*, for failure to state a claim for relief with the particularly required by FRCP 9(b). Appendix at 7a.

Petitioners' sole basis for challenging the affirmance is their feigned "shock" that the Circuit dismissed "claims under Section 1962(c)," which Petitioners now purport to have abandoned in their appeal to the Circuit. Petition at 10. As an initial matter, Petitioners' claimed "error" is without a basis in fact, as the record is devoid of *any* evidence of an abandonment of Petitioners' Section 1962(c) claim (the Eighth Claim in the Amended Complaint) or of a modification of Petitioners' notice of appeal. That notice clearly manifests Petitioners' intent to appeal "each and every part" of the District Court's dismissal order. (A 787).

Even assuming that Petitioners had in fact abandoned their Section 1962(c) claim, the "error" of the Second Circuit in dismissing that claim in no way affects the rationale underlying its dismissal of all Civil RICO Claims for failure to plead a federal claim for relief. As noted above, substantially all of the alleged "predicate acts" which form the basis of Petitioners' claims under both Sections 1962(a) and (c) relate to Coutts' performance of the alleged "Coutts Commitment." There is no dispute in any of the relevant case law, however, that "broken promises . . . cannot serve

as [RICO] predicate acts." *Mills*, 12 F.3d at 1176. Moreover, as for Petitioners' allegations that Coutts misrepresented "that the [Stock] had a value far greater than its actual value," (A 126), securities fraud is clearly no longer cognizable as a predicate act for purposes of a civil RICO claim. Section 1964(c), as amended in the PSLRA, expressly states that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962." *See* 18 U.S.C. § 1964(c) (1999).[2]

Finally, as was the case with the Rule 10b-5 Claims, both the District Court and the Second Circuit noted that the Civil Rico Claims fell well short of pleading allegations of

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2. Petitioners' Civil RICO Claims were hopelessly insufficient in other material respects. For example, the Amended Complaint summarily alleged that Coutts was an "enterprise" under 18 U.S.C. §§ 1961(4), 1962. (A 125). The mere allegation that Coutts engaged in "fraud" in the conducting of its operations did not, however, transform Coutts into an "enterprise." *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (RICO violation insufficiently alleged where the enterprise "consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant"). Nor did the Amended Complaint establish a "pattern" of activity on the part of Coutts. In the end, the "frauds" alleged against Coutts, even if true, were part of a single transaction with a finite purpose and with no threat of continuity against Petitioners or anyone else. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (RICO statute requires at least two acts of racketeering); *H. J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989). Nor was there any basis for inferring that the predicate acts alleged by Petitioners, namely "mail" or "wire fraud," would continue unabated. *See GICC Capital Corp. v. Technology Fin. Group*, 67 F.3d 463, 466 (2d Cir. 1995) ("It defies logic to suggest that a threat of continued looting exists when, as plaintiff admits, there is nothing left to loot").

"mail" or "wire fraud" with the particularity required under FRCP 9(b). Appendix at 7a, 15a; *see Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 726 (7th Cir. 1998) (Rule 9(b) applies to RICO claims); *Jepson Inc. v. Makita Corp*, 34 F.3d 1321, 1327-28 (7th Cir. 1994).

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONERS LEAVE TO REPLEAD THEIR FEDERAL TORT CLAIMS

The only other "error" addressed in the Petition is whether the District Court abused its discretion by denying Petitioners leave to replead their facially defective federal claims. In that regard, this Court has held that district courts have sound discretion to grant or deny leave to replead a dismissed complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Whether or not leave to replead has been requested, the "futility" of any further amendments clearly constitutes a valid ground for district courts to deny leave to replead or amend. *Foman*, 371 U.S. at 1802; *Keeney v. Kemper Nat'l. Ins. Cos.*, 1998 U.S. App. LEXIS 1226, *6-7 (2d Cir. Jan. 27, 1998); *F.D.I.C. v. Bathgate*, 27 F.3d 850, 874-75 (3d Cir. 1994); *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 226 (8th Cir. 1994); *Hutsell v. Sayre*, 5 F.3d 996, 1006 (6th Cir.), *cert. denied*, 510 U.S. 1119 (1993). In denying leave to replead in this case, the District Court was not faced with a party's inadvertent omission of a few material allegations from its pleading or the inartful drafting of a claim. (Petitioners could hardly be accused of leaving anything out of their 53-page Amended Complaint.) Rather, as set forth herein, the hundreds of allegations in the Amended Complaint, even if true, simply did not give rise to claims for relief under the federal securities laws or the

RICO statute. The District Court specifically noted that the Amended Complaint, although "inordinately long," did not "come close" to meeting the exacting pleading requirements of the PSLRA or FRCP 9(b). Appendix at 14a. Nor would Petitioners ever "come close" to creating a federal fraud with improbable allegations of a breach of a "$100 million to $150 million" oral commitment to lend. As such, both the Second Circuit and the District Court were correct in concluding that it could not "be reasonably supposed" that leave to replead would cure the deficiencies in the Amended Complaint.

CONCLUSION

As set forth above, Petitioners have highlighted nothing in the Second Circuit's affirmance which represents in any way a departure from well-established legal principles regarding the dismissal of conclusory allegations of securities fraud and racketeering. Thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PHILIP H. SCHAEFFER
Counsel of Record
J. CHRISTOPHER SHORE
WHITE & CASE LLP
Attorneys for Respondent
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200